Could the word "Legislatures" in Article V have reached the courts, in a proper case demanding interpretation, before the proclamation of January 29, 1919, then the courts might with propriety have declared themselves. But by that proclamation the political departments of the government have expressed themselves. To avoid conflict with those departments has always been the aim of state and federal courts, under the leadership of the United States Supreme Court.[36] And it is submitted that here, without shirking responsibility or without departing from precedent,[37] the Judiciary may refrain from all action except the adoption and application of that interpretation of Article V already declared by the other two branches of the federal government.

STATE CONTROL OVER INTERSTATE BRIDGES. — That constitutions should be regarded as living instruments, the fundamental principles of which are applicable to varying conditions, is illustrated in the history of our "commerce clause."[1] It is a significant fact that until 1860 only twenty cases involving its construction had been submitted to the Supreme Court; while today, because of the breadth of its application and the diversity of interests involved, probably no other clause of the Constitution must be considered so often by our federal tribunals. The construction of the clause as applied to interstate commerce has been varied, and it is impossible to reconcile the language of the various decisions. But throughout there has been the steady development of a fundamental principle. Until the case of *Gibbons* v. *Ogden*[2] it was doubted whether the clause gave Congress control of navigation when carried on among the several states. In that case the view was taken that the national power is "exclusive," even when dormant.[3] This was questioned in *Willson* v. *Blackbird Creek Co.*,[4] and in the *License Cases*[5] it was limited in favor of state regulation where Congress had not acted. The basis of the modern rule was first adopted as the rule of decision in *Cooley* v. *Port Wardens*.[6] The general principle there applied was that the power of Congress is exclusive as to those subjects which require uniformity; while in peculiarly local matters the states may act within

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36 Cases cited in notes 28 to 34, *supra*.

37 "In forming the constitutions of the different States, after the Declaration of Independence, and in the various changes and alterations which have since been made, the political department has always determined whether the proposed constitution or amendment was ratified or not by the people of the State, and the judicial power has followed its decision." Taney, C. J., in Luther *v.* Borden, 7 How. (U. S.) 1, 39, 12 L. Ed. 581, 597 (1849).

1 U. S. CONST., Art. I, Sec. 8, clause 3: Congress shall have power "To regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

2 9 Wheat. (U. S.) 1 (1824).

3 See also Brown *v.* Maryland, 12 Wheat. (U. S.) 419 (1827).

4 2 Pet. 245 (1829).

5 5 How. (U. S.) 504 (1846).

6 12 How. (U. S.) 299, 319 (1851).

their respective jurisdictions until Congress sees fit to act.[7] But the application of this rule has led to more confusion.[8]

A recent case[9] illustrates the difficulty of finding any definite *criteria* for the distinction taken in *Cooley* v. *Port Wardens*.[10] The power of a state to regulate the establishment of ferries[11] and the construction of bridges[12] has been recognized as valid. Where they run across boundary waters between two states, the traffic over them is interstate commerce.[13] Accordingly, in *Covington Bridge Co.* v. *Kentucky*,[14] it was held (at least in the absence of mutual action)[15] that neither state could regulate tolls on an interstate bridge built pursuant to the concurrent action of the two states.[16] In *Port Richmond Ferry* v. *Hudson County*,[17] however, it was held that New Jersey could regulate boundary ferries between that state and New York and prescribe rates on ferriage from its own shore. The West Virginia case[18] goes further in holding that the state may declare invalid the use of a pass from another state.

It is suggested that this confusion is due in part to the different methods of approach. Thus, one attitude seems to start with the proposition that the power of Congress to regulate interstate commerce is *prima facie* exclusive, throwing the burden upon the state to show justification for its action. It is submitted that it would be more logical to work from the other end. Thus, *prima facie*, the power to regulate

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7 The rule is stated to the same effect in *Ex parte* McNeil, 13 Wall. (U. S.) 236, 240 (1871); Welton *v.* Missouri, 91 U. S. 275, 280 (1875); Mobile *v.* Kimball, 102 U. S. 691, 697 (1880); Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196, 204 (1885); Bowman *v.* Chicago, etc. Ry. Co., 125 U. S. 465, 481, 485 (1888); Covington Bridge Co. *v.* Kentucky, 154 U. S. 204, 212 (1894); Minnesota Rate Cases, 230 U. S. 352, 399, 400 (1913); Port Richmond Ferry Co. *v.* Hudson County, 234 U. S. 317, 330 (1914).

8 See, for example, the cases relating to the power of the states to regulate charges on interstate carriers within the state, reviewed in Wabash, etc. Ry. *v.* Illinois, 118 U. S. 557 (1886), and compare the latter case with The Minnesota Rate Cases, 230 U. S. 352 (1913).

9 Schrader *v.* Steubenville, etc. Co., 99 S. E. 207 (W. Va.) (1919). For a statement of the facts, see RECENT CASES, *infra*, p. 312.

10 *Supra*, note 6.

11 Conway *v.* Taylor, 1 Black (U. S.) 603 (1861).

12 Cardwell *v.* Bridge Co., 113 U. S. 205 (1885).

13 Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196 (1885); New York Central R. R. Co. *v.* Freeholders, 227 U. S. 248 (1913).

14 154 U. S. 204 (1894).

15 See Broadway & Newport Bridge Co. *v.* Commonwealth, 173 Ky. 165, 190 S. W. 715 (1917). U. S. CONST., Art. I, Sec. 10, clause 3, provides that "No State shall, without the consent of Congress, . . . enter into any agreement or compact with another State." However, if the two states should establish uniform regulations over the bridge, it would seem that the possibility of friction between them would be academic and the need for regulation by Congress slight.

16 The Kentucky statute undertook to regulate the fares on the bridge as to commerce from both sides. However, the opinion of the majority of the court seemed to take the view that the state had no power to regulate the rates of toll on commerce on such a bridge to any extent. The separate opinion of the four justices, who concurred in the result, stated that "the several states have power to establish and regulate ferries and bridges, and the rates of toll thereon . . . subject to the paramount authority of Congress over interstate commerce" (p. 223).

17 234 U. S. 317 (1914).

18 See note 9, *supra*. The court held that there was no legislation by Congress with respect to the pass, as the bridge was unconnected with any railroad. 8 U. S. COMP. STAT. 1916, § 8563, p. 9054.

interstate commerce continues,[19] as does other legislation not expressly prohibited, to reside in the state, with, however, the vast limitation[20] that the state's regulations as to such commerce are wholly subordinate to the power of the nation as to this same matter;[21] and that, even though the nation has not acted at all, a state may not deal with such commerce so as to clog its operation as such by way of hostile discrimination. Under this theory we would start with the proposition that the state retains its sovereign powers unless limited expressly or by reasonable implication. Thus, where Congress has not acted, the test is whether the regulation is unreasonable or discriminatory. In applying the test, the underlying purpose of the clause must be kept in mind — to avoid serious clashes between the states in the exercise of the power over a common agency.

Accordingly, it would seem that a state has the power, in the absence of action by Congress, to prevent extortion by regulating the rates on a bridge or ferry[22] across a boundary stream as to commerce emanating from its shore. In such a local situation, the interests of the states are such that the prospect of any serious clash between them is slight; a mere difference in tariff rates from different shores is not important. But where either state attempts to prevent such extortion by regulating the rates as to commerce from the other shore it is thereby derogating from similar authority of that state; there would be almost inevitably different regulations as to the same commerce and serious friction between the states. Accordingly the power would be disallowed.[23] Likewise it would seem that a state could not regulate the rates for round-trip tickets;[24] the argument that it is commerce emanating from its shore is

[19] Under the Articles of Confederation there were practically no restrictions upon the power of the several states to regulate interstate commerce. See Art. VI. It was the separate commercial legislation of the states and the want of a general power over the subject by the federal government which threatened the harmony of the United States under the Confederation. During the Constitutional Convention, many proposals to make the extent of the federal power over commerce definite were rejected. Likewise a motion to make the commerce clause by express terms "sole and exclusive" was lost by a vote of six states to five. For a discussion of the history of the commerce clause, see PRENTICE AND EGAN, THE COMMERCE CLAUSE OF THE CONSTITUTION.

[20] These limitations are so vast that frequently the state's power is said to have been wholly suspended or destroyed.

[21] For a collection of the cases showing the ways in which the state power has been used legitimately, see The Minnesota Rate Cases, *supra*.

[22] It seems possible to draw a distinction between the case of a bridge and a ferry on the ground that the latter is considered historically of a more peculiarly local nature. See Conway *v.* Taylor, 1 Black (U. S.) 603 (1861); Freeholders *v.* The State, 24 N. J. 718 (1853); Port Richmond Ferry *v.* Hudson County, *supra*, pp. 331–332. A further distinction might be drawn on the basis of the fundamental difference of the two, the ferry being movable, in reality, as to either state at times within its jurisdiction and going in only one direction at a time; while the bridge is immovable, part fixed in either state and the traffic in both directions at all times. But it is submitted that these differences are insufficient to merit different conclusions, and apparently this is the view taken by the courts. See Charles River Bridge *v.* Warren Bridge, 11 Pet. (U. S.) 420 (1837); Covington Bridge Co. *v.* Kentucky, *supra*, p. 218; Port Richmond Ferry *v.* Hudson County, *supra*, p. 328; Schrader *v.* Steubenville, etc. Co., *supra*, p. 212.

[23] Covington Bridge Co. *v.* Kentucky, *supra*. See also Port Richmond Ferry *v.* Hudson County, *supra*, p. 333.

[24] This question was expressly left undecided in Port Richmond Ferry *v.* Hudson County, *supra*, p. 333. In the principal case (*supra*, note 9, p. 212), the pass was

specious, in that the journey is broken and in fact there is a separate trip each way. Here again there is real danger of controversy between the states. The case of a pass is more troublesome. There is undoubtedly a difference in degree between regulating the rate of charges on commerce from the other shore and in saying that a person shall not come into the state on a public service corporation *gratis* when others are required to pay.[25] But in both cases the power invoked by the state will affect only indirectly its morals, peace, and welfare, while there is the same danger of conflict with the other state. The test of the necessity for uniformity is the danger of irreconcilable regulation according to the diverse and discriminatory interests of the states involved.

It is submitted that this is the attitude of the Supreme Court.[26] The apparent diversity in the decisions is due to some extent to the practical manner in which it has been applied. Where there is actual danger of serious conflict, the exercise of the power by the state would be inexpedient and an unreasonable burden upon commerce. But where controversy is merely a possibility, the exercise of the power by the state within its jurisdiction is legitimate. It is to be hoped that the West Virginia case will be taken to the Supreme Court, as its decision would do much to point out the correct *criteria* of the extent of a state's power over interstate commerce.

ELIGIBILITY OF WOMEN FOR PUBLIC OFFICE. — While many courts in the last half-century have expressed opinions that women are ineligible for office at common law, the great majority of the cases directly involve only the construction of a statute or constitution. In Great Britain, the question has been whether an act fixing the qualifications for a certain office is to be construed as giving women the right to hold it; in America, most of the cases turn upon whether there is a broad constitutional inhibition. While the question of common-law eligibility can enter in each type of case, courts in both countries have confused considerations of interpretation and construction with a problem of substantive law.

The constitutions of a not inconsiderable number of states do not expressly confine the right to hold office to electors, and have not been amended to give women the vote. In such states, when a woman claims her election or appointment to office is valid, the first question must be whether, apart from common-law eligibility, there is an implied restric-

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treated as a succession of round-trip tickets. The power of a state to limit the charge for a round-trip ticket was recognized as valid in Missouri *v.* Sickmann, 65 Mo. App. 499 (1896).

25 "Its only effect is equalization by apposite proscription against discrimination in the various forms of commercial exchange of commodities and intercourse between the states." Schrader *v.* Steubenville, etc. Co., *supra*, p. 212. But suppose one state stipulates in the franchise of the corporation that its public employees shall be permitted to use the bridge free of charge and the other state commands the corporation to allow no one to pass free.

26 See Covington Bridge Co. *v.* Kentucky, *supra*, pp. 220–221; Port Richmond Ferry *v.* Hudson County, *supra*, pp. 330–333. See also Broadway & Newport Bridge Co. *v.* Commonwealth, 173 Ky. 165, 172, 190 S. W. 715, 718 (1917).